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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 394

MENDOCINO WOOD PRODUCTS, INC.,
Petitioner,

vs.

ALBERT MILLER, ROBERT B. RIDDLE, and ARTHUR O. WOODALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California
First Appellate District, Division Two

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1. Certified copy of the clerk's transcript and the reporter's transcript of the Superior Court trial, filed in the office of the Clerk of the District Court of Appeal of the State of California, First Appellate District.
2. Certified copy of the opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two.
3. Certified copy of petition for rehearing filed in the District Court of Appeal, First Appellate District, Division Two, and certified copy of the order denying said petition.
4. Certified copy of petition for hearing filed in the Supreme Court of the State of California, and certified copy of order denying said petition.
5. All of the original exhibits in evidence at the trial in the Superior Court, certified by the Clerk of said Court, and consisting of plaintiff's exhibits: 1, 2, 3, 4, 5, 6, and 7; and of defendants' exhibits A, B, C, D, E, F, G, H, I, J, and K. These exhibits are itemized at page 3 of the Clerk's transcript on appeal.

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No.

MENDO WOOD PRODUCTS, INC.,
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ALBERT MULDER, ROBERT B. RIDDLE, and ARTHUR O. WOODALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the
State of California
First Appellate District, Division Two

Mendo Wood Products, Inc., a corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California in and for the First Appel-

late District, Division Two, numbered 1 Civil 21,307, filed and entered March 17, 1964, as to which judgment the Supreme Court of the State of California denied a hearing on May 17, 1964.

OPINIONS BELOW

The Memorandum Opinion of the Superior Court dated November 20, 1962 and filed November 23, 1962, is unreported and is printed in Appendix A hereto, *infra*, page 1. Findings of Fact and Conclusions of Law of the Superior Court, dated and filed December 21, 1962, are unreported and are printed in Appendix A hereto, *infra*, page 7. The judgment of the Superior Court dated and filed December 21, 1962 is unreported and is printed in Appendix A hereto, *infra*, page 11. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two, is printed in Appendix A hereto, *infra*, page 13. This opinion is not yet reported in permanent form in The California Reporter but is presently printed in Advance Sheet form in Volume 37 California Reporter, page 479. It has not yet been reported in permanent form in the California Appellate Reports, but is presently printed in Advance Sheet form in Volume 225 Advance California Appellate Reports, page 761. The order denying the petition for rehearing in the District Court of Appeal is presently unreported, but a copy thereof is printed in Appendix A hereto *infra*, page 34. The order of the Supreme Court of the State of California denying the petition for hearing is

presently unreported but a copy thereof is printed in Appendix A hereto, *infra*, page 35.

JURISDICTION

The judgment of the District Court of Appeal of the State of California, First Appellate District, Division Two, was entered on March 17, 1964. (*Infra*, Appendix A, page 13.) A timely petition for rehearing in said Court was denied on April 16, 1964. (*Infra*, Appendix A, page 34.) A timely petition for hearing by the Supreme Court of the State of California was denied on May 13, 1964. (*Infra*, Appendix A, page 35.) An order by the Superior Court of the State of California in and for the County of Mendocino staying execution on appeal from its judgment herein directing the payment of money, and based upon the deposit of $16,000, was filed in that Superior Court on the 16th day of June, 1964, granting a stay until the final determination is rendered by the Supreme Court of the United States upon this petition.

The jurisdiction of this Court is invoked under *American Railway Express Company v. Levee*, 263 U.S. 19; under *Atchison, Topeka & Santa Fe Railway Co. v. Robinson*, 233 U.S. 173, 181; *St. Louis, Iron Mountain and Southern Railway Company v. Starbird*, 243 U.S. 592, 594, 599, and *Illinois Steel Co. v. B. & O. Railroad Co.*, 320 U.S. 508, 511; and under Title 28, U.S.C., Judiciary and Judicial Procedure, Section 1257, subd. 3 (Appendix B, page 37.) Since the right and title of petitioner is specially set up and

claimed under the statutes, commission held, and authority exercised under the United States.

These authorities sustain the power and the jurisdiction of this Court to review the State Court judgment of which review is here sought.

QUESTIONS PRESENTED

1. When in an action in a State Court under the Fair Labor Standards Act and its companion acts, the Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, it is both proven and admitted that the employer operated as a private carrier, subject to the provisions of the Act, during the complete calendar years 1957-1958, and was then exempt from overtime compensation provisions, may the State Court in the absence of either proof or finding of any change in our termination of the exempt status of defendant employer as such operator under the Act, deprive it of the benefits thereof?

2. Where it is both proven and admitted in a State Court action under the Fair Labor Standards Act and its companion acts, the Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, that during the calendar years 1957-1958 the defendant employer was engaged in hauling its own products as a private carrier in interstate trucking commerce, and was during those years exempt from overtime compensation provisions, may the State Court use evidence purporting to establish non-interstate activity

in the calendar years 1959-1960, *sans* any action, proceeding, or notice, by or from any source, to support a judgment that such employer is no longer engaged in interstate commerce?

3. May a State Court, where the issue is whether defendant is subject to the payment of overtime compensation under the Fair Labor Standards Act, and its companion acts, the Motor Carrier Act of 1935; and the Portal to Portal Pay Act of 1947, and where such Court wholly fails and omits (actually *refuses*, C.T. pp. 42-45) to make findings of fact as to the number of actual hours worked and paid for, or that petitioner was not exempt from overtime compensation provisions, render judgment for overtime compensation (carrying heavy penalties imposed thereby and therefor) and thereby deprive defendant employer of his property and of the benefits of the Federal statutes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved here are Section 8, Clause 3, and Amendment XIV, Section 1. The statutes involved here are Title 28 U.S.C., Judiciary and Judicial Procedure, Section 1257, subd. 3; Fair Labor Standards Act, Title 29 U.S.C., Labor, Chapter 8, Sections 207, 213, 216; The Motor Carrier Act of 1935, Title 49, U.S.C., Transportation, Interstate Commerce Act, Part II, Sections 303, 304; Portal to Portal Pay Act of 1947, Title 29, U.S.C.,

Labor, Chapter 9, Sections 255 and 260; Code of Federal Regulations, Title 29, Labor, Appendix, Chapter 5.

The pertinent provisions of these several sections of the Constitution of the United States and of these several statutes are printed in Appendix B, infra. A detailed pagination index precedes that portion of this petition which is devoted to appendices, and will also be found in the index at the front of this printed petition.

STATEMENT OF THE CASE

Note: petitioner deprecates the length of this statement, but under the questions here presented, deems it impracticable to attempt further condensation.

The three named respondents, Mulder, Riddle and Woodall were employed as truck drivers by petitioner herein, Mendo Wood Products, Inc., a lumber manufacturer whose plant is situated in the County of Mendocino, State of California. These men had been so employed for a number of years including the calendar years 1959 and 1960. On May 24, 1961 they filed a complaint for wages against petitioner herein.[1] This was to recover *overtime compensation*, together with statutory penalties and attorney's fees, for work performed in 1959 and 1960. The complaint is in the form

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[1] (and against two codefendants who did not perfect an appeal from the judgment and with whom we are not here concerned).

of three separate and similar causes of action, one for each of the three. (C.T. pp. 4-13.)[2]

Each of the counts alleges that defendant therein was a corporation subject to the laws of the State of California and to the provisions of the Fair Labor Standards Act enacted by the United States Congress. (C.T. p. 4, p. 6, p. 8.) The counts are almost identical except as to hours and amounts. That of Mulder, e.g., (C.T. 4-6), alleges that from the 1st of September 1959 to the 1st of August 1960 he was an employee of defendant corporation working as a truck driver; during that period he worked 1325 hours in excess of 40 hours per week; that he had 1325 hours overtime, as to which he was entitled to time and a half, whereas he had been paid only straight time. That his wages were 2.37 per hour; that he had demanded payment of the overtime but defendant had failed, refused and neglected to pay it—that he was damaged in the sum of $2500—that it became necessary to employ an attorney to prosecute the action and that the sum of $500 was a reasonable amount to allow for that purpose; and that the alleged failure by the employer was a violation of law and that the employer was "therefore liable to said employee in an additional amount to the unpaid wages as liquidated damages." Prayer for such relief follows.

The Riddle count (C.T. pp. 6-7) and the Woodall count (C.T. pp. 8-9) were in almost the exact phraseology—only the dates and amounts differing.

[2]There was a fourth cause of action upon which judgment was reversed by the District Court of Appeal and it will not be discussed here.

Defendant corporation (petitioner here) filed its answer (C.T. pp. 13-31) and a supplement to the answer (C.T. pp. 32-33). By its answer—separately to each count—defendant admitted that it was subject to the provisions of the Fair Labor Standards Act—admitted that plaintiffs, respectively, were employed as "truck driver and operator in the usual course of its business, which business included operating as a 'private carrier of property by motor vehicle' within the meaning of the Motor Carrier Act of 1935 as Amended"; that plaintiffs added nothing to the value of the goods, commodities, or articles that were hauled, that the action and proceeding was not of a nature to qualify for the payment of attorney's fees and costs as provided in 29 U.S.C., Sec. 216. (C.T. 14, 19, 24, respectively.) Except as above indicated defendant denied each of the allegations in the complaint.

As an affirmative Answer (and again the allegations respecting Mulder are exactly illustrative of those respecting Riddle and Woodall) defendant alleged (C.T. p. 15) that it was "engaged in the purchase and harvesting of timber, the manufacturing of lumber and wood products, and in the sale of lumber and wood products throughout the United States of America". And that "in the course of its business tenure, defendant operated a lumber and wood products manufacturing facility on Ridgewood Ranch in Mendocino County, California." Further alleging: "That defendant herein was, at all times material to this action, a carrier whose transportation by motor vehicle was, throughout the tenure of defendant's operations, sub-

ject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act of 1935." The affirmative answer further alleged "that throughout all times herein referred to the employees of said class in which plaintiff, Albert E. Mulder, was employed were employees with respect to whom the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service pursuant to the provisions of sec. 204 of the Motor Carrier Act, 1935, and that such power was not limited to the provisions of sec. 204(a) (3a) of said Act". Further alleging (C.T. p. 5) "That the employees within said class were engaged in the operation of a motor vehicle for and behalf of the defendant as a private carrier of property by motor vehicle within the meaning of the Motor Carrier Act, 1935, as amended (29 U.S.C., sec. 201 et seq.). That employees within said class did operate and drive said motor vehicles upon and over public highways and in interstate commerce within the meaning of the Motor Carrier Act aforesaid." The affirmative Answer contained further allegations (C.T. pp. 16-18) respecting the activities of the employees of said class, that they personally drove and operated the motor vehicles to which they were assigned—that they were required in the regular course of their employment to "haul lumber and wood products over public highways from defendant's limber and wood products manufacturing facilities to warehouses, lumber yards, or depots, which lumber and/or wood products were thereafter shipped into and through States of the United States

other than the State of California without any further processing or manufacturing being done upon or with respect to the lumber or wood products hauled"; it further alleged pick-ups and deliveries of items other than lumber in the regular course of their employment as truck drivers and, alleged further (C.T. p. 18) that they were "specifically exempted from the maximum hours and overtime provisions of the Fair Labor Standards Act by the terms and provisions of sec. 13(b)(1) of said Act (29 U.S.C., section 213(b)(1)) as during all of such period of time said Interstate Commerce Commission had the power to establish, for such class of employees, qualification and maximum hours of service, pursuant to the provisions of sec. 204 of the Motor Carrier Act, 1935, as amended." Similar allegations were made as to each of the plaintiffs therein.

The action was tried upon the issues raised by these pleadings. The evidence, objections and arguments as shown throughout the reporter's transcript, and the oral argument of counsel for plaintiffs (R.T. pp. 269 to 279) so disclose. The memorandum opinion of the trial court (C.T. pp. 34(a) to 34(g)) wherein reference is also made to the Portal to Portal Pay Act of 1947, likewise so established. This memorandum opinion is printed in full in Appendix A hereto, *infra*, page 1.

As stated, the memorandum opinion of the trial judge of the Superior Court discloses the various federal questions which were discussed in that court. (C.T. 34(a) to 34(g).) Findings of Fact and Con-

clusions of Law (C.T. pp. 35-38) and Judgment (C.T. pp. 39-41) were signed and filed. The total awards by the judgment (in addition to their regular pay long since collected) were, respectively: Respondent Mulder, $4,441.80; Respondent Woodall, $4,480.00; and, Respondent Riddle, $4,282.46, *plus* $500 attorney's fee allowed to each. (C.T. pp. 39-40.) Motion for a new trial, upon which one of the questions presented herein by petitioner was the omission from the findings of fact of either specific periods of employment, or specific numbers of hours worked, was denied. (C.T. pp. 41a-45.) (A modification was made as to interest, which does not affect this petition.) Thereafter a timely Notice of Appeal was filed to the District Court of Appeal of the State of California, First Appellate District and regularly assigned to Division Two thereof. Appellant's opening brief, respondents' reply brief, appellant's closing brief, were filed, the case was orally argued and submitted, decided adversely to petitioner herein (except as to one factor which does not affect this proceeding). Thereafter a petition for rehearing in said Court was filed and denied. This was the last Court which had jurisdiction of the appeal.[3] A petition for hearing was filed in the Supreme Court of the State of California and denied. That was the final step possible except the instant petition. The petition for rehearing and the petition for hearing are each before this Court as a part of the duly certified transcript of the record.

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[3]Topic "Jurisdiction" supra, page 3. Constitution of the State of California, Sections 4, 4a, 4b.

Mendo Wood Products, Inc. was a California corporation which manufactured lumber at a mill on the Ridgewood Ranch, near Ukiah, California and near California State Highway Number 1. It manufactured only "studs" (2 x 4's of various lengths) and sold them through wholesale lumber brokers. It had been engaged in that business for some years prior to 1959. It used leased trucks for transporting a substantial quantity of studs to designations indicated by its brokers. Some of these deliveries were made by trucks to points within the State of California, some of them were made by truck without the State of California, some of them were delivered by truck directly from the mill to the Ridgewood Station of the Northwestern Pacific Railroad Company, for continuous transportation to out of state points. In these operations it had for several years employed various truck drivers, three of whom were the plaintiffs who brought this action in the Superior Court. During the calendar years 1957 and 1958 all three of these methods of shipment were frequently used.

With no announced change in methods of operations petitioner after January 1, 1959 made no direct truck shipments to out of state points. It did, however, continue to ship lumber directly to out of state points by delivering it to the railroad station just referred to. One of the points in controversy here arises out of the fact that the railroad station was located upon the same real property as was located the mill. When *low* loads were transported the trucks operated through a tunnel under the railroad tracks and did not touch

the public highway in making delivery to the railroad station. Upon *high* truck loads there was evidence that on occasion during the years 1959 and 1960 loads of studs enroute to the railroad station were hauled over California State Highway Number 1—although these specific plaintiffs testified that they had never used State Highway Number 1.

The findings of fact here *did not resolve a controversy* between the testimony of the three plaintiffs and that of Elwood C. Welch, a corporate official (in which case it might be contended that the finding by the trial court could not be attacked). On the contrary testimony of Mr. Welch as to hauling over California State Highway Number 1 (R.T. 214-216) consisted of additional, further, and undenied testimony and there thus arose no conflict. That this is true also appears from the memorandum opinion of the Superior Court (C.T. p. 34(b)) where the Court says: "It was conceded that some trucks may from time to time have used a portion of U. S. Highway 101, but that this was a negligible part of the trip, and that most of the trucks did not use this route. There is no testimony to contradict the plaintiffs' claim that they did not traverse U. S. Highway 101 in making deliveries to the railroad."

The testimony shows without dispute that during the years 1959 and 1960 petitioner shipped large quantities of studs to various wholesale lumber brokers within the State of California, and that a considerable percentage thereof were trans-shipped without the State of California without re-manufacturing

or change of any kind, and in their original form. The correctness of this statement appears from the depositions of William Sharp (Def. Ex. F) and of Robert Hill (Def. Ex. G). Both of these exhibits have come forward with the records of the case.

The studs which were transported from the mill to the railroad station were there loaded on flat cars and consigned to destinations in Georgia, Texas and Arizona, respectively. Each week during the term of time involved in this action (the calendar years 1959 and 1960) approximately two railroad cars were so loaded each week—each car carrying more than 30,000 board feet of studs. Petitioner operated the trucks, had complete control of the trucks, and employed and compensated the truck drivers. (R.T. 215:1 to 216:23.) This action represented no claims made by any of the three plaintiffs for periods worked prior to January 1, 1959—during which period direct truck shipments were admittedly made outside the State of California.

One further type of shipment from *without* the State during 1959 and 1960 is established by the testimony of the witness of E. D. Thompson. (R.T. p. 144, et seq.) As appears by this testimony a substantial quantity of feed mill component parts was carried by the trucks of petitioner herein from the Miller Manufacturing Company in Turlock, California, to the Ridgewood Ranch. Also, that many of these component parts were ordered by Mr. Thompson, Manager of the Miller Manufacturing Company, directly from eastern suppliers from other states for use upon the Ridgewood Ranch, and that such parts were shipped

initially from the points of origin, respectively, outside the State of California, to Turlock. There the parts remained, in their original form, and were transported to the Ridgewood Ranch during the calendar years 1959 and 1960.

Mr. Welch testified as a corporate officer of petitioner that petitioner had no change in corporate policy in 1959 and 1960; that it sought only to sell its products in the market without regard to limitations either interstate or intrastate, that the corporation executives believed they were continuing to perform transportation service in the flow of interstate commerce during these two years and that it was not subject to the wage provisions of the Fair Labor Standards Act. (R.T. 221-223.) During these two years all truck drivers, including these three respondents, were paid in full at the straight time rate, including paid holidays and paid vacations. Time records were maintained in the form of time cards and number of hours to be paid to the drivers for each trip was written on the time card when the driver returned from the trip. Petitioner paid its truck driver employees every two weeks and the drivers were compensated upon the basis of total hours worked during that period, plus holidays.

Plaintiff Mulder testified as to the method used by *all* of the plaintiffs in computing overtime—a method subsequently approved and allowed by the trial court.

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[4]All of these timecards are evidence, and have come forward with this petition. Those of Mulder are Pls. Ex. 5, those of Woodall are Pls. Ex. 3, those of Riddle are Defs. Ex. A.

(C.T. p. 51, l. 17, to p. 58, l. 17.) In substance, he stated that he took the timecards for all of 1959 and 1960, totaled the hours from the first through the fifteenth, from the 16th to the end of the month. If the entries were within 14 days, he then subtracted 80 hours and treated the remainder as overtime. If the entries were over a 15 day period he then subtracted 88 hours and treated the remainder as overtime. No consideration was given to calendar weeks or basic workweeks. He included paid holidays in his computations of time worked. If he was paid for a holiday during a 15 day period, he included the 8 hours for purposes for determining the number of hours worked. The result would be that, in these computations, overtime was claimed for considerable periods of time not worked. (C.T. p. 54, ls. 4 to 23.) The same was true as to the other two plaintiffs. Petitioner has presented the Mulder testimony as illustrative of that of the others.[5]

Thus petitioner was severely prejudiced by the Court's failure to find the number of hours worked by each plaintiff in excess of 40 each workweek. In their computation of overtime hours each plaintiff claimed 8 hours for each paid holiday they enjoyed in 1959 and 1960. These are hours for which they were paid but which they did not work. This is substantiated by the evidence now before this Court.

Each plaintiff computed his claimed overtime hours on a summary sheet from his time cards. (Mulder, Pls.

[5] Count 4, claims of plaintiff Riddle for breakdown time, and allowance of interest, were disposed of in the lower courts and do not concern this petition.

Exs. 5 and 6; Riddle, Defs. Ex. A and Pls. Ex. 7; Woodall, Pls. Exs. 3 and 4.) A consideration of the pay period, January 1, 1959 to January 15, 1959 clearly demonstrates this error. Mulder's time card (Pls. Ex. 5) for this period credits him with 123¼ paid hours. This figure includes eight hours attributed to January 1, 1959 and is clearly marked "holiday." Hence, in fact, Mulder actually worked only 115¼ hours for the period January 1, 1959 to January 15, 1959.

In his computation (Pls. Ex. 6) Mulder claimed 123¼ hours as total hours worked for this period. From this he subtracted 88 hours as straight time and listed the remainder (35¼) hours as the number of overtime hours worked by him in this period. He multiplied this figure by $1.18½ cents (one-half his regular rate of compensation) and claimed $41.77 as unpaid and due overtime compensation. The money judgment in this case is simply an adoption by the Court of these computations by plaintiffs.

Hence, Mulder received $18.96 (8 hours times $2.37) from petitioner to take a day off; was also awarded $9.48 (8 times $1.18½) as overtime pay for this same holiday; and was also awarded an additional $9.48 as a penalty imposed upon petitioner for its "willfull" failure to pay him time and one-half for these holiday hours. Defendant's Exhibit C demonstrates that the three plaintiffs *claimed and were awarded overtime compensation, plus penalties for at least 152 hours—holiday hours—which they did not work.*

During the years 1959 to 1960 none of the plaintiffs at any time made a claim for compensation for overtime (R.T. 58, lines 14-17) or any other form of penalty, and plaintiffs and defendant in the California action at all times conducted themselves as believing that the truck drivers employed by petitioner were not subject to the wage provisions of the Fair Labor Standards Act. Many of the foregoing statements fall in the category of "Facts Admitted" and are set forth in appellant's opening brief, pages 9-10, without challenge.

Appellant believes that the foregoing recites and encompasses those facts necessary to enable this Court to have before it the acutal and complete factual picture necessary to the determination of this petition. Appellant does not believe that any briefer statement would have sufficiently served that purpose. It is earnestly and respectfully hoped that the petition for the writ will be granted and petitioner thereby enabled to more adequately, completely, and forcibly present both the facts and the legal issues involved.

REASONS FOR GRANTING THIS WRIT

PRELIMINARY STATEMENT

Petitioner has set forth above three separately numbered "Questions Presented". However, they really fall into a single category and petitioner believes that its argument can be presented more briefly and more effectively by discussing the three under the same

treatment. Petitioner has meticulously endeavored to place before this Court, by way of this petition, by way of Exhibits A and B hereto attached, and by the dispatch of the complete certified transcript of the record, *including* all original exhibits in evidence in the trial court, everything which would reflect the cause below. It has also, under the heading "Statement of the Case", been equally meticulous in supplying this Court with a full and accurate record of proceedings had and of testimony given, insofar as it affects this petition. If petitioner has erred in the detail and length thereof, it has done so solely in the effort to aid this Court by presenting the true "picture" of this case, from the date the complaint was filed in the Superior Court in California until a hearing thereof was denied by the Supreme Court of the State of California, albeit as briefly as reasonably possible.

In essence, the single question propounded to this Court is one which petitioner believes to be of tremendous importance, both to it for the financial reasons disclosed by the record herein (in large sums for penalties and attorney's fees), and for a wider and larger reason to those classes of people (into which actually fall not only petitioner, itself, but the individual plaintiffs as well) about whom the Congress has seen fit to throw protective laws, e.g., The Fair Labor Standards Act and its two companion acts referred to in the footnotes to each of the preceding "Questions Presented" were enacted to protect the people of the United States, *all* the people, and that protection includes, of course (authorities *infra*) pro-

tection from a State government—whether it be executive, judicial or legislative.

Mooney v. Holohan, 294 U.S. 103;
36 C.J.S., Federal Courts, Sec. 28, p. 150;
11 Cal. Jur., 2d, Constitutional Law, Sec. 395, p. 774.

These three acts were and are intended to ensure to employees certain rights and privileges. But that was not their sole purpose, they were and are intended also to protect the *employers*. In the case here brought before this Court the right of the employees (plaintiffs therein—respondents herein) was (barring exemptions to the employer, petitioner herein) to receive time and one-half for more than 40 hours work performed in one week, and if not so paid, they were entitled to have a judgment for the one-half unpaid, for an additional equal amount as liquidated damages, and for attorney's fees. (Section 216(b) of the Fair Labor Standards Act, Apdx. B, *infra*, page 38.) This protection for the *employees* (plaintiffs in this case) was received in the State courts. However, these same statutes afforded the right to the employer (petitioner herein) to be exempted from payment of the one-half overtime compensation, with its penalties and attorney's fees, in certain events—including the operation of a trucking business by a "Private carrier of property by motor vehicle . . . in interstate . . . commerce . . . in furtherance of any commercial enterprise." (Sec. 303, Motor Carrier Act of 1947, Apdx. B, *infra*, page 39.) This right was a concomitant of the other: hence where the employees have been

awarded extra compensation, liquidated damages, and attorney's fees, for services performed while the employer was so engaged in interstate commerce as a private carrier, they were *not* entitled thereto. Thus, simple academic justice joins with legal and constitutional requirement in the relief here sought.

What was it that determined in the State courts that this award should be made in favor of the employees and against the employer? Evidence, which the Court believed, that defendant was not so engaged during the time covered (1959-1960). The Court also awarded such payments for services rendered from January 1, 1959 to May 24, 1959, all for services performed more than two years prior to the commencement of the action, payment of which is inhibited by Section 255 of the Portal to Portal Pay Act of 1947. (Apdx. B, hereto, *infra;* p. 40.) This, to defendant's severe financial loss.

And how did the state court accomplish these things of which petitioner complained vainly to the appellate courts of the State of California, including its Supreme Court? By omitting from its Finding of Fact (even after its errors were pointed out fully and accurately by petitioner herein upon motion for new trial (C.T. 42-45) and its various steps on appeal, *supra,* page 11), matters which, first would sustain the position of defendant, and second, were in violation of the mandatory statutes and of the decisions of the State of California. Petitioner's position is that simple. But the fact remains that it is heavily aggrieved, and that it is saddled with a judgment for a

large sum of money, with heavy preparation and litigation expenses and costs, all because of what it believes to be, and believes it can here establish: *the erroneous denial to it of the protection of these federal statutes.*

All applicable constitutional provisions and legislative enactments and regulations, in pertinent part, are appended hereto as Exhibit B. Section 8, Clause 3 of the Constitution of the United States because under that clause this protective legislation was enacted; Amendment XIV to the Constitution of the United States for the reason that it must appear herefrom that petitioner has been deprived of its property without due process of law; Title 28 U.S.C., Section 1257, subd. 3, for the establishment of the right to petition this Court for the writ of certiorari here sought; the Fair Labor Standards Act, Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, for the reason that these are the enactments by the Congress which establish the rights sought to be enforced in this litigation—not only by the employees, but by the employer; Federal Regulations Title 29, for the reason that they contain the interpretation of the Department of Labor respecting the workweek overtime compensation here involved, which sustain petitioner's contentions, and which were appropriately called to the attention of both the trial and appellate courts during the progress of the case.

The Judgment of the State Court rests upon Findings of Fact which (1) omit a finding of any change in or termination of the admitted status of petitioner as a private motor carrier operator exempt from the Fair Labor Standards Act during 1957-1958, (2) omits a finding that the status of petitioner as an exempt private motor carrier under the Fair Labor Standards Act terminated upon January 1, 1959—with the record entirely silent as to any action, proceeding or notice of such termination; (3) omits a findings as to the number of actual hours worked and paid for (that being the essential basis for the penalties imposed by the Act and the Judgment).

As we have seen in the first portion of the Statement of the Case, the findings of fact and conclusions of law of the trial court are very brief (three double spaced transcript pages) and contain *no slightest reference* to any item or condition of employment or transaction prior to January 1, 1959. (C.T. 35-38.) The judgment, even briefer, contains a page and a half (C.T. 39-40) and is even less specific—mentioning only money and no date prior to June 1, 1961.

This situation of the record means merely that a 13-page four-count complaint (C.T. 4-13) and a 20-page both denial and affirmative answer (C.T. 13-33) have, by a trial before the Court without a jury been finally resolved to findings and judgment of the meagre length and content just indicated. So meagre in fact, that petitioner is encouraged in its contemplation that this Court will conclude a most important issue is involved and for such reason grant the writ herein applied for.

There were numerous other contentions made in the courts below but petitioner has deliberately seen fit to

"concentrate its fire" upon these here presented. It confidently trusts that it has made no mistake in that regard.

The situation we have, basically, is the interpretation by the California courts of its own law and of the federal statutes hereinbefore mentioned (and described, in pertinent form, in Appendix B hereto). An action appropriately tried under the California law and federal law, but improperly decided. And, as in all such cases, where the State court has by its actions nullified for a litigant the rights, privileges, and protection afforded and guaranteed to such litigant, by the federal constitution and by federal statutes which have, in turn, been enacted pursuant to constitutional authority. This, as we have also seen hereinabove. In other words, the State court may try the issues raised by the parties hereto, and may—in fact, must—apply the California rules of law thereto. In so doing, however, the State courts may not evade or ignore the rights accorded to the litigants by federal laws. Or, as we here assert, disregard or disobey or fail to observe the laws of the State of California in such manner as to effect the deprivation to the litigants of such federal rights. It is to this extremely important point or question, exactly exemplified by the proceedings in the State court in the instant case, that petitioner earnestly, conscientiously and vigorously directs the attention of this Court.

With respect to required findings of fact and conclusions of law, Section 632 of the Code of Civil Procedure of the State of California reads, insofar as here applicable, as follows:

> "In Superior Courts and municipal courts, upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated. The statement of facts found shall fairly disclose the court's determination of all issues of fact in the case. * * * judgment upon the decision must be entered accordingly. * * *"

This section has been in effect in California since the enactment of its codes in 1872. It has been amended four times since then. None of the changes would affect the situation here presented. The last amendment, in 1959, was the addition of the third sentence quoted above viz., "The statement of facts found shall fairly disclose the court's determination of all issues of fact in the case." Due to its importance, this section has been construed many, many times by the courts of California as is evidenced by the annotations to the West and to the Deering annotated publications of the California Code of Civil Procedure.

In the brief space accorded for a petition of this character—directed solely to securing the issuance of the writ—it is not possible to review these decisons. However, the subject matter is carefully treated in 48 California Jurisprudence, 2d, under the heading of "Trial". This volume bears the publication imprint of 1959 and there is appended thereto a 1964 Pocket Cumulative Supplement. Petitioner respectfully directs the Court's attention to the fact that the topic

of findings of fact and conclusions of law is there discussed in sections 279 to 318, and will here quote from the text very briefly. The supporting notes (numbers carried here for convenience) have been examined and petitioner believes they are confirmatory of the text.

Section 294 *Scope of Findings* (p. 294):

> "It is essential that, unless they are waived, findings be made on every material issue raised by the pleadings[16] and the evidence,[17] whether those issues are raised by denial of the allegations of the complaint[18] or cross-complaint,[19] or on affirmative defenses set up in the answer[20] or cross-complaint.[1] * * * *
>
> Although failure to find on a material issue is reversible error,[5] at least if the omitted findings may have the effect of controverting or destroying the effect of other findings,[6] specific findings on each of several material issues are not necessary, where taken as a whole or construed together the findings clearly show that they include the material issues.[7] * * *"

And see *O'Brien v. O'Brien,* 124 Cal. 422, and *Bird v. Murphy,* 72 C.A. 39.

From Section 300, *Definiteness and Certainty* (p. 300):

> "The findings should be framed with sufficient definiteness, certainty and clarity to indicate what it intended,[1] or what theory it adopted.[2] The party against whom they are made must be able to specify any particulars in which they are not supported by the evidence.[3] Where they are not sufficiently definite and intelligible to dispose of the

> material issues without resort to speculation and conjecture, a judgment based thereon will be reversed.'"

And see *J. J. Howell and Associates, Inc. v. Antonini,* 124 C.A.2d 388, and *Hicks v. Barnes,* 109 C.A. 2d 859.

Nowhere in the record of the instant case is there an indication of any requirement that the motor vehicles of an exempt motor carrier in interstate commerce need have an operating permit, or carry special registration plates, or *any* special requirement except such as may be imposed by the Interstate Commerce Commission. Nor was there any showing that such plates or any other suggested items were carried in 1957 to 1958, when it is admitted that petitioner was so operating. There was no question of any kind nor any legal objections of any kind interposed anywhere during the proceedings respecting petitioner's operations prior to January 1, 1959.

It has been repeatedly held that in order to be engaged in interstate commerce it is not necessary that the employer's equipment actually *cross state lines,* but it is only necessary that the property transported in the trucks *be in interstate shipment.*

> *Beggs v. Kroger Company,* 167 F. 2d 709 (Arkansas, 8th Cir.);
>
> *Fletcher v. Grinnell Bros.,* 78 F. Supp. 339 (D.C., Mich., S.D.).

These authorities establish, as a matter of law, that the trucking operations conducted by petitioner dur-

ing 1959-1960 were in interstate commerce. (We find no case which holds that change of title in the property composing the shipment alters the interstate nature of the commerce.)

As we have seen, there is no conflict in the evidence here which could sustain the findings and judgment of the trial court by reason of a State rule of law. The three plaintiffs testified only that *they* did not operate trucks upon the public highway. The testimony of Mr. Welch, secretary of the petitioner corporation *does not create a conflict*—his testimony (R.T. 215:1 to 216:23) was that many trips were made during 1959-1960 from the mill over the public highway (California State Highway No. 1) to the railroad station. There was no contra. Thus we have a situation which the trial court should not have, and could not have ignored—but did. *Florida v. U.S.*, 282 U.S. 194, involved a United States District Court and an order of the Interstate Commerce Commission—rather than State law in a State court. We, nevertheless, have the views of this Court—upon the question of findings expressed in the language of Mr. Chief Justice Hughes. Therein a proposal had been submitted to the Commission for a revision of interstate rates. The Commission made a tabular comparison of other rates, concluded that the interstate rates thus proposed were reasonable, and made certain findings (p. 206). In its discussion of the circumstances of that case the opinion says, page 212:

> ". . . it must appear that there are findings, supported by evidence, of the essential facts as to the

particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which justified that conclusion."

The opinion continues to discuss the absence of findings upon various essential points, and strongly presents confirmation of the rule petitioner believes should be applied in the instant case (page 215):

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

Of like purport was *Webster-Brinkley Co. v. Belfield*, 166 F.2d 814 (C.A. 9th Cir.) where the Fair Labor Standards Act was interpreted in the light of the necessity for findings.

Thus this Court has spoken respecting the *necessity* of *essential* findings—and the holding therein is no less appropriate to the State case which is here brought before this same Court for review. That this is true is established by numerous decisions of this Court. The classic language of Mr. Justice Holmes

in *Davis v. Wechsler*, 263 U.S. 22, at p. 24, expresses it well:

> "If the Constitution and laws of the United states are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

And:

Ogama v. California, 332 U.S. 633.

The decisions are clear that is is not necessary for the Interstate Commerce Commission under the Motor Carrier Act of 1935 to *actually establish* the "reasonable requirements" etc. in that Act provided. In the language of *Morris v. McComb*, 332 U.S. 422, which comments upon and expressly carries along the rules laid down in the cases of *Levinson v. Spector Motor Service*, 330 U.S. 649, and *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, it is said, at page 431, that it is:

> ". . . the character of the activities rather than the proportion of either the employee's time, or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment."

And at page 434 the opinion further states:

> "We hold that the Commission has the *power* to establish qualifications and maximum hours of service, pursuant to the provisions of Section 204

> of the Motor Carrier Act, for the entire classification of petitioner's, drivers and 'mechanics' and it is the existence of that power (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not Section 7 of the Fair Labor Standards Act is applicable to these employees. Congress has gone out of its way to make this purpose clear in cases comparable to the one before us." (Emphasis by the Court.)

To the same effect is *Southland Gasoline Co. v. Bayley*, 319 U.S. 44.

These same cases are also authority that (p. 423 of the *Morris* case) 3 to 4 per cent of the total carrier services, distributed generally through the year, is sufficient to empower the Commission, although not holding that *any* specific proportion is required. This opinion reviews prior cases—and contains other illustrations.

At this point petitioner would like to present to this Court a point raised in Question Presented, No. 2, *supra*, and in the subheading to this treatment. Petitioner presented this contention in nearly identical language to the California Supreme Court at pages 12, 13 and 14 of its Petition for Hearing (which has come forward, not as a brief, but as a part of the transcript of the record).

It was shown in the Statement of Facts in the Court below, and in the Statement of the Case herein, *supra*, that petitioner had been engaged since 1955 in the hauling of lumber en route to Eastern points. During

the entire period down to 1960, inclusive, both plaintiffs below and petitioner believed the operations were, *as they admittedly had been prior to January 1, 1959,* in interstate commerce, and so exempt from the provisions of the Fair Labor Standards Act. *After* 1960, plaintiffs below brought this action and sought to prove that during 1959 and 1960 such exempt status no longer obtained. To such contention is addressed this argument.

Why a change in its status? It was making the shipments referred to in the Statement of the Case—it was ready at any time to make out of state shipments by trucks—if the orders came in. There was no point of stoppage of its status. We have been able to find no case which says how—or when—such a right is lost. Petitioner is not a common carrier, with published tariffs—but, like all other such motor carriers, enjoys quite an informal status—determined by the nature of its activities.

Petitioner submits that the facts set forth above and the law discussed in this petition should settle the controversy—and *do* settle it. Whatever rights petitioner formerly had as a private motor carrier *it still has.* It has never lost them—no one has ever taken them away—no official body has ever notified it that it has lost its rights. Just when was there a termination? We have found no criterion—but it must be a long, long time. Would anyone stop petitioner if it shipped a truckload of "studs" to the East coast tomorrow morning? Or while plaintiffs were still working for it? And if its rights had not been terminated it still has them, and as a consequence,

during 1959 and 1960 plaintiffs were exempt from the coverage of the Fair Labor Standards Act—just as they had been in 1958 and prior years. Hence they were not entitled to recover any of the amounts claimed.

Would an out of state delivery on January 1, 1958 have been without the operation of the exemption? Or one on July 1, 1958? When, then, did the exemption expire—and are we not entitled to *know* when? If petitioner had shipped out *one load* in December, 1959 would it have been "reinstated"? If so, from what source?

When and how has the Interstate Commerce Commission revoked the right to enjoy this privilege? Is there any formal proceedings required? Was there any such proceeding? Was there *any* proceeding? Does not the consideration of these numerous inquiries compel the conclusion that a finding of such termination was absolutely essential to sustain a judgment in this case? Only the Commission (which has not acted, and does not ordinarily act in such situations) or the trial court in this case could determine the situation. And if the trial court is to deprive petitioner of its admitted rights under the federal act then it must *necessarily* make a finding to that effect. *We have no finding!*

What were the findings of fact in this case, or, perhaps, what were *not* the findings of fact in this case?

There were no findings as to the specific periods of employment of any of the plaintiffs, the periods for which time and one half was to be paid, or the number

of hours at which the one and one half times basic rate was required by the law. There was a finding that plaintiffs worked various times in excess of 40 hours per week and there was a finding that the plaintiffs each received a rate of pay of $2.37 per hour or more. No finding was made as to the specific rates of pay upon which the overtime awards were computed or made. And there are no findings of fact on appellant's *affirmative* defense that plaintiffs were exempt from the overtime provisions of the Fair Labor Standards Act. There are no findings of fact as to the number of hours worked by each plaintiff in excess of 40 hours per week.

Actually, evidence consisting of the plaintiff's original time cards (which have come forward in the record to this Court) contradict the trial court's findings of fact as to the amount due each plaintiff for overtime. This has been heretofore set forth.

In computing the overtime hours for which plaintiffs based their claim plaintiffs did not take a single work week as a standard. Instead, they averaged hours over a semi-monthly period. (RT 52:6-16.) It is quite patently contrary to the definition of overtime set forth in the Act itself—and it was so held in *Black v. Roland Electrical Co.*, 68 F. Supp. 117 (D.C., D. Maryland).

Whether or not plaintiffs were exempt from the Fair Labor Standards Act is, of course, a question of law. Plaintiffs must have proven the number of hours worked in excess of 40 in *any given work week*. This figure must then be multiplied by one half the rate of regular compensation applicable to any workweek

in which hours in excess of 40 were worked. It is a right created by statute. It is, therefore, the legal duty of plaintiffs to clearly establish each element of the right to recover and this has not been done. *Nor do the findings of fact so state.* When records are adequate under the Fair Labor Standards Act (and they were in this case, and have come forward as a part of the record) findings cannot be based—as were the findings here—upon estimates, guesswork, or "plaintiffs' computations."

Anderson v. Mt. Clements Pottery Co., 328 U.S. 680;

Gorchakoff v. Calif. Shipbuilding Corp., 63 F. Supp. 309.

The trial court failed and refused to make findings on the specific number of hours worked by each plaintiff in excess of 40 in each workweek for which unpaid overtime compensation is claimed—it failed to find the regular rate of compensation applicable to each workweek for which unpaid overtime compensation is claimed. The District Court of Appeal opinion ignored the omission of such findings—*indispensable to the judgment.*

May such a device frustrate an employer in the protection of his rights under federal statutes? *Stardivant v. Salt River Valley Water Users Assn.* (C.A., 9th Cir.) 249 F.2d 944, was an action commenced under the Fair Labor Standards Act and an appeal which the Court said carried "a whole attack upon the findings and conclusions of the trial court". The findings in this case were somewhat comparable to those in the instant case. The Court said (p. 950)

there should be a specific finding in that: "this should set out the actual hours worked and the pay received and the pay found due." To petitioner this seems a clear and fair statement of a rule of law which could hardly be otherwise. The Court remanded the case for specific findings or a new trial.

These are the computations on which the trial court based the judgment—in its findings of fact the court merely adopted plaintiff's figures as the amount of the unpaid wages due each item. (CT 36:6-10.) As we have seen, they are clearly erroneous and contrary to the law. The District Court of Appeal ignored them, but, involving a federal right as they do, petitioner hopes for relief in this Court.

The opinion of the District Court of Appeal completely omits reference to *holidays*—a very vital matter in the failure of the findings. The opinion likewise attempts to support its holding by relying upon *Dallum v. Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785. (Apdx. A, p. 22.) This was merely a District Court opinion (Minnesota). It is the only authority so cited and petitioner respectfully asserts that the District Court there held that the essential character of the commerce determined whether the plaintiffs were engaged in transportation of goods in interstate commerce. It does not support the opinion we here attack.

The District Court of Appeal opinion refers to the shipment of feed mill parts (R.T. 144, et seq.—also statement of the case, *supra*) as merely an "isolated incident". (Apdx. A, p. 23.) Actually, it was one of

many—including the direct shipment from the mill over the *public highway* in California to the railroad station and thence to Georgia, Texas and Arizona, discussed hereinabove.

The opinion held that the finding of the total amount of overtime paid to each respondent was a "statement of ultimate fact"—citing in support thereof *Nisbet v. Rhinehart*, 2 Cal.2d 477, 482. (Apdx. A, p. 30.) Again, that Court was in error, for the *Nisbet* case *is strictly limited by its terms* to that type of action in which a finding of indebtedness is a proper statement of ultimate fact. The *Nisbet* case recognizes only one exception to the rule that a general finding of indebtedness is a conclusion of law. That exception is the case of the "common count". Petitioner respectfully submits that the *Nisbet* case does not support the District Court of Appeal that the holding of the amount of overtime pay due is a proper statement of ultimate fact. The net result, to be slightly repetitious, was to deprive petitioner of its rights under the federal statutes.

The correct California rule is set forth in the very highly respected work of B. E. Witkin on *California Procedure*, Vol. 2, Trial, sec. 113, at page 1844, and in the 1963 Permanent Supplement thereto (page 569) is found this language:

> "*Indebtedness.* In an action for accounting, a general finding of indebtedness is insufficient if the appellate court cannot discover from the record the manner in which the account was calculated and the items which entered into it. (Shenson v. Shenson (1954) 124 C.A. 2d 747, 754, 269 P. 2d 170.)"

The *Shenson* case involved an accounting which failed to show the court's computation.

The evidence, the findings and the conclusions demonstrate that the judgment was rendered without the slightest consideration of the rights created by the Fair Labor Standards Act. Plaintiffs were awarded monies for unpaid overtime compensation (and penalties, plus attorney's fees) without considering the Act's definition of overtime. These awards actually included compensation for hours plaintiffs did not work—for holidays—even for hours they did not allege in their complaint. And, of course, the total scope of the plaintiffs' activities must be considered as a whole.

The only reasonable contention that could be made to uphold the findings of the trial court—affirmed by the District Court of Appeal—would be reliance upon the finding that defendant (this petitioner) was subject to the Fair Labor Standards Act. However, this is not and cannot be a proper finding of ultimate fact. That such a finding is a mere conclusion of law is evidenced by innumerable authorities, including

Kantar v. Garchell, 150 F. 2d 47 (C.A., 8th Cir.);

Webster-Brinkley Co. v. Belfield, 166 F. 2d 814 (C.A., 9th Cir.).

Petitioner realizes it cannot—even though it would appear that it has already done so—imposed upon this Court all the details—contentions—and authorities—urged before the several state courts. It seeks here only to convince this Court that it was necessary

to have proper findings—that without them petitioner has been wrongfully deprived of rights guaranteed to it by constitutionally tested federal enactments; and that such holding would in the future affect many persons, and that hence the writ should be granted.

CONCLUSION

Surely the State Court here has decided a federal question of substance "in a manner which petitioner believes is probably not in accord with applicable decisions of this court" (Supreme Court Rules, 19(1)(a)); and surely petitioner has now established that such belief was correct. The granting herein of the writ of certiorari applied for would serve two purposes—both of which are desirable—both of which are salutary—both of which are of importance. In importance to the public we have a factor particularly close to the heart of this Court, in that it is of tremendous importance to a very considerable number of people—to all of the people—that a State Court be not permitted to deprive such persons, either real or artificial, of the protection afforded to them by the Constitution of the United States, or by enactments of the Congress which have been declared to be within the provisions of such Constitution, by the very simple expedient of omission or refusal (in the present case *flat refusal*) to sign findings of fact which are required by State, as well as Federal, law, *as an essential basis for the entry of a judgment.*

As petitioner has carefully pointed out—and has tried to do so clearly and distinctly and unmistakably

—brushing to one side other issues which were raised in the lower courts and which it might also present to this Court—all to the end of establishing both facts and law which will, it trusts and believes, impel this Court to issue the writ here prayed for. The other reason, very important to petitioner and doubtless also of interest to this Court—although it fears not determinative upon that ground alone, is the correction of the grave injustice by which petitioner will be mulct of very considerable sums of money to go to the pockets of plaintiffs below, and of their attorneys, for wages, penalties, and fees, none of which were ever in the slightest degree expected or anticipated during the period of employment or until long thereafter.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JAMES F. KEMP,

Counsel of Record.

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*Also contained in Title 29, Code of Federal Regulations, Section 785.0, until that section was renumbered as 785.1 by 26 Federal Regulations 7732, August 18, 1961, and the language slightly changed, but not in such manner as to affect this litigation.

Appendix A

[Title of Court and Cause]

MEMORANDUM OPINION AND ORDER FOR FINDINGS

This is an action brought by the plaintiffs against the defendants for overtime compensation under the Fair Labor Standards Act. It is conceded by the defendants that their operation is covered by the Fair Labor Standards Act unless they come within the Motor Carrier Exemption found in Section 13 of the Act.

It has been conceded by the plaintiffs that they were employed by defendants in interstate commerce prior to the year 1959. The effect of this pre 1959 activity in interstate commerce will be discussed later in this opinion. Likewise, there is no basic fact conflict as to the nature of the operation during 1959 and 1960. The basic dispute is whether or not the facts as conceded bring the shipments under the provisions of the Motor Carrier Act. During the year 1959-60 the defendants shipped lumber by two different means and each of the plaintiffs was involved in each of the methods of shipping. The first method used by the defendants for shipping their lumber was to haul it from their mill over private roads to the railroad where the lumber was loaded on railroad cars and shipped out of state, and admittedly in interstate commerce. Each of the plaintiffs claimed that they drove trucks from the mill to the railroad entirely on a private road. It was conceded that some trucks may from time to time have used a portion of U. S. Highway 101, but that this was a negligible part of the trip and that most of the

trucks did not use this route. There is no testimony to contradict the plaintiffs' claim that they did not traverse U. S. Highway 101 in making deliveries to the railroad. It is contended by the defendants, however, that because the plaintiffs went under Highway 101 they thereby somehow became involved with a public highway which brings them within the provisions of the Motor Carrier Act. The Court is not persuaded that this is so and feels that this portion of the transportation clearly comes within the holding in 34 motor carrier cases, Interstate Commerce 556, cited in the plaintiffs' brief.

It is the finding of the Court, therefore, that such shipments did not bring the plaintiffs within the scope of the Motor Carriers Act and, hence, outside the application of the Fair Labor Standards Act.

The other type of shipment by the defendants during 1959 and 1960 was a truck haul from the defendants' sawmill over the public highways to wholesale and retail lumber yards, where the lumber was unloaded from the truck, held in the yard, and later trans-shipped to other points. The evidence does not show that the defendants intended that the lumber be shipped out of state upon reaching its California destination, nor did they intend that it remain in the state. It seems apparent to the Court that their primary concern was with selling it, and that its disposition after delivery by them was entirely within the discretion of the buyer of the lumber, and that it cannot be held that these hauls from the defendants' mill to the lumber yard were in interstate commerce.

It seems to the Court that these shipments were similar to those described in Dallum vs. Farmers Cooperative Trucking Association, 47 F. Supp. 785, 789, where the Court said:

> "Apparently it was the plan and intention of the National Butter Company to store the butter at St. Paul until such time as transportation thereof to customers could be made. No further movement of any particular part to any particular person was contemplated. Delivery depended upon the demand of the customers of the National Butter Company."

The Court went on to indicate that under these circumstances the local transportation was not in Interstate Commerce.

We now return to the significance of interstate transportation prior to 1959. The defendants have urged that even though a small part of the time spent by the plaintiffs while in the employ of the defendants was spent in interstate shipments this would make all of their employment exempt from the application of the Fair Labor Standards Act. The case of Morris vs. McComb held that even though less than 4% of the shipments of the employer were in Interstate Commerce, where the employees were engaged indiscriminately in that activity they were covered by the Motor Carrier Act and exempt from the Fair Labor Standards Act. This case was followed in the case of Rogers Cartage Company vs. Reynolds, 166 Fed. 2nd 317, where the Court held an employee who had spent 39 out of 55 weeks engaged intra-state shipments to nevertheless be covered by the Motor Carrier Act and

exempt from the Fair Labor Standards Act. If the plaintiffs had engaged in even an occasional shipment in interstate commerce during the years 1959 and 1960 there would be no question about their being exempt from the provisions of the Fair Labor Standards Act. But they did not do that, and hindsight now enables us to see that there was a complete change in the method of operation beginning with January, 1959. The Court feels that they were no longer covered by the Motor Carriers Act on January 1, 1959, and that from that time forward they were subject to the provisions of the Fair Labor Standards Act.

Section 207 of the Fair Labor Standards Act indicates that the basis for determining hours shall be weekly, since it provides that "No employer shall employ any of his employees . . . for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1½ times the regular rate at which he is employed."

It follows therefrom that Plaintiff Mulder shall have judgment for $2,220.90, Plaintiff Woodall shall have judgment for $2,240.03, and Plaintiff Riddle shall have judgment for $1,885.77.

Normally an employee is entitled to liquidated damages equal to the amount of overtime pay which he should have been paid. It is provided, however, in 29 U.S.C.A. 260, "If the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards

Act of 1938 as amended, the Court may in its sound discretion award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 216(b) of this Title." Here it is urged that based upon this section the Court should not make an award of liquidated damages. It is well established that the burden of showing good faith is upon the defendants in an action such as this.

See Parks vs. Pucket, 154 Fed. Supp. 842, 850.

It is stated in Rothman vs. Publicker Industries, Inc., 201 Fed. Reporter 2nd 618, 620, after quoting the above section of the United States Code, as follows:

> "We understand this language to impose upon the delinquent employer who had escaped the payment of liquidated damages a plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict."

In that opinion the court approves the language of the District Court, which reads as follows:

> "The utmost that could be derived from the evidence in this respect is that the employer had the bona fide belief that the plaintiff was within the exempt class. It is well settled that reasonable cause in the portal to portal act means more than that. The Court has no option other than to add liquidated damages and counsel fees to the verdict."

Based upon these authorities the Court is of the opinion that it has no option but to add liquidated damages to the verdict in an amount equal to the overtime pay. In addition, the Court is obligated by

the Act to make an award of attorney's fees to the plaintiffs. The Court is of the opinion that $500.00 is a reasonable attorney's fee for each plaintiff in this action.

This brings us to the breakdown claim of Riddle. The Court finds it difficult to understand defendants' claim that Riddle is not entitled to standby time during breakdowns. It seems to the Court that it is immaterial that the employer had no practice of paying for breakdown time. The Court feels that defendant Riddle has adequately established his claim to breakdown time in the sum of $511.92, but that neither attorney's fees nor a penalty would be appropriate in this instance for it is not shown that this breakdown time amounted to either overtime time not included in the previous award or any other form of compensation within the Fair Labor Standards Act. Actually this award is based upon an implied contract to pay the employee for time spent for the benefit of the employer and is not based upon the Fair Labor Standards Act as are the rest of the claims in this action.

The plaintiffs will prepare findings of fact and conclusions of law consistent with this opinion and the matter will be on the Court's Calendar for the settlement thereof on December 20, 1962.

Dated this 20th day of November, 1962.

Robert L. Winslow
Judge

Filed Nov. 23, 1962
W. J. Broaddus, County Clerk
By M.H., Deputy

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 30th day of April, 1962, before the court sitting without a jury, a jury having been expressly waived, Thomas F. Cleland appearing as counsel for the plaintiffs, and Timothy O'Brien appearing as counsel for the defendants, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. That it is true that at all times herein mentioned defendants were engaged in the buying, processing, selling and transportation at wholesale and retail of lumber and forest products. That at said times, defendants were subject to the laws of the State of California and to the provisions of the Fair Labor Standards Act enacted by the United States Congress. That it is true that during the years 1959 and 1960, the plaintiffs herein were employed by defendants as truck drivers and while so employed, plaintiffs, at various times and in various weeks, worked in excess of forty (40) hours per week. That for said hours of overtime, plaintiffs were entitled to time and a half whereas plaintiffs were paid only straight time. That the hourly compensation of plaintiffs at straight time was $2.37 per hour or more. That the amount of un-

paid wages due plaintiff Albert E. Mulder is the sum of $2,220.90. That the amount of unpaid wages due plaintiff Robert B. Riddle is the sum of $1,885.77. That the amount of unpaid wages due plaintiff Arthur O. Woodall is the sum of $2,240.03. That each of said plaintiffs is entitled to said sums. That the same has been demanded from defendants, but they have refused to pay said sums to plaintiffs. That it has become necessary for plaintiffs and each of them to employ an attorney to prosecute this action. That the sum of $500.00 is a reasonable sum to allow for each plaintiff herein for the services rendered by said attorney. That the total of said sum so allowed is the sum of $1500.00. That it is true that the failure of said employers to pay said overtime is a violation of law and said employers are therefore liable to said employees, the plaintiffs herein, in an additional amount to the unpaid wage as liquidated damages.

2. That it is true that Robert B. Riddle while in the employ of defendants worked a total of 216 hours for which he received no pay whatsoever. That the current rate of pay at the time was $2.37 per hour. That the wages due and unpaid to said plaintiff is the sum of $511.92. That the defendants are indebted to plaintiffs in the sum of $511.92 for said unpaid wages.

From the foregoing facts, the court concludes:

Conclusions of law

1. That plaintiff Albert E. Mulder is entitled to judgment against defendants in the sum of $2,220.90 for unpaid overtime wages plus interest at the rate of

7% per annum from June 1, 1961, plus the sum of $2,220.90 as liquidated damages plus the sum of $500.00 for attorney's fee, plus costs.

2. That the plaintiff Robert B. Riddle is entitled to the sum of $1,885.77 unpaid overtime wages plus interest at the rate of 7% per annum from June 1, 1961, plus the sum of $1,885.77 as liquidated damages plus the sum of $500.00 attorney's fees plus the sum of $511.92 unpaid wages with interest from June 1, 1961, together with his costs of suit.

3. That plaintiff Arthur O. Woodall is entitled to the sum of $2,240.03 unpaid wages plus the interest thereon at the rate of 7% per annum from June 1, 1961, plus the sum of $2,240.03 liquidated damages plus the sum of $500.00 attorney's fees together with his costs.

Let judgment be entered accordingly.

Dated: This 21 day of December, 1962.

Robert J. Winslow
Judge of the Superior Court

PROOF OF SERVICE

State of California
County of Mendocino.—ss.

I, the undersigned, declare under penalty of perjury:

That I was at the time of the service of the papers herein referred to, over the age of eighteen years and not a party to the within entitled action.

That on November 30, 1962, I served a true copy of the Findings of Fact and Conclusion of Law in the above entitled action on Katherine Shanyfelt, legal secretary for Timothy O'Brien, Attorney for Defendants, 150 North Pine Street, Ukiah, California.

Dated: November 30, 1962.

Sharon Johnson

Filed Dec. 21, 1962
W. J. Broaddus, County Clerk
By M.M., Deputy

[Title of Court and Cause]

JUDGMENT

This cause came on regularly for trial before the court sitting without a jury on the 30th day of April, 1962, Thomas F. Cleland appeared as attorney for the plaintiffs, and Timothy O'Brien appeared as attorney for the defendants, and the Court having heard the testimony and having examined the proofs offered by the respective parties and the Court being fully advised on the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid;

It is hereby Ordered, Adjudged and Decreed:

1. That plaintiff Albert E. Muldér have judgments against the defendants and each of them the sum of $2,220.90 with interest thereon at the rate of 7% per annum from June 1, 1961, and the further sum of $2,720.90 with interest thereon at the rate of 7% per annum from date hereof until paid.

2. That plaintiff Robert B. Riddle have judgment against the defendants and each of them in the sum of $1,[illegible]77 plus interest thereon at the rate of 7% per annum from June 1, 1961, and the further sum of $2,897.69 with interest thereon at the rate of 7% per annum from date hereof until paid.

3. That plaintiff Arthur O. Woodall have judgment against the defendants and each of them in the sum of $2,240.03 with interest at the rate of 7% per

annum from June 1, 1961, and judgment for the further sum of $2,740.03 with interest thereon at the rate of 7% per annum from date hereof until paid.

4. That plaintiffs have judgment against the defendants for their costs herein taxed at $.....

Dated: This 21 day of December, 1962.

Robert L. Winslow
Judge of the Superior Court

PROOF OF SERVICE

State of California
County of Mendocino.—ss.

I, the undersigned, declare under penalty of perjury:

That I was at the time of the service of the papers herein referred to, over the age of eighteen years and not a party to the within entitled action.

That on November 30, 1962, I served a true copy of the Judgment in the above entitled action on Katherine Shanyfelt, legal secretary for Timothy O'Brien, Attorney for Defendants, 150 North Pine Street, Ukiah, California.

Dated: November 30, 1962.

Sharon Johnson

Filed Dec. 21, 1962
W. J. Broaddus, County Clerk
By M.M., Deputy

Judgments Book 38 Page 331
Entered Dec. 21, 1962

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

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1 Civil No. 21,307

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,

vs.

Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

OPINION

This is an action by three former employees of defendant Mendo Wood Products, Inc., to recover wages allegedly due them under the Fair Labor Standards Act of 1938 (29 U.S.C.A., §§ 201 et seq.). The complaint alleged that plaintiffs Albert Mulder, Albert Woodall, and Robert Riddle, were each employed as truck drivers by the defendant for specified periods during the years 1959 and 1960; that each of the plaintiffs worked a considerable number of hours in excess of 40 hours per week; that at the times such employment was performed, defendant was subject to the provisions of the Fair Labor Standards Act and

was required to pay plaintiffs time-and-a-half for their hours of overtime; that defendant had in fact paid plaintiffs only straight time and that they were therefore entitled to recover the difference between time-and-a-half and straight time for the hours of overtime worked, liquidated damages in an equal amount, and attorney's fees. In addition, plaintiff Riddle alleged that during the years 1959 and 1960, he had worked a number of hours in the defendant's employ for which he had received no pay whatever. He sought straight wages for the hours so worked, liquidated damages in an equal amount, and attorney's fes.

The defendant answered, admitting that it was subject to the Fair Labor Standards Act at the times mentioned in the complaint, and that it had employed plaintiffs as truck drivers during the periods alleged. As an affirmative defense to each cause of action, defendant alleged that it was a private carrier of property by motor vehicle within the meaning of Part II of the Interstate Commerce Act (49 U.S.C.A., §§ 301 et seq.); that plaintiffs were employees with respect to whom the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service pursuant to said act; and that plaintiffs were accordingly exempted from the maximum hours and overtime provisions of the Fair Labor Standards Act by section 13, subdivision (b)(1) of said act (29 U.S.C.A., § 213(b)(1)).

The evidence established that defendant was a California corporation engaged in the manufacture and

sale of studs, and that its principal place of business was located at the Ridgewood Ranch in Ukiah, California. In order to deliver its studs to purchasers, the defendant used trucks which it leased from other companies and which were operated by drivers in its own employ. Plaintiff Mulder was employed by the defendant as a truck driver during the period from January 1, 1959 through September 15, 1960; plaintiff Woodall, during the period from January 1, 1959 through July 15, 1960; and plaintiff Riddle, during the period from January 1, 1959 through August 15, 1960. Time cards covering the periods in question showed that each of the plaintiffs had worked a substantial number of hours in excess of 40 hours per week, for which they were paid only straight time. Computations based upon these time cards demonstrated that the difference between straight time and time-and-a-half pay for the total number of overtime hours worked came to $2,222.90 in the case of plaintiff Mulder; $2,240.33 in the case of plaintiff Woodall; and $1,885.77 in the case of plaintiff Riddle. In addition, plaintiff Riddle, during the period from May 1, 1959 through July 31, 1960, spent 216 hours attending his truck during breakdowns on the road and received no compensation whatever for this time. Straight time pay during the period in question was $2.37 per hour.

The evidence relative to the interstate character of defendant's trucking operations revealed that in the year 1958, defendant's drivers did transport shipments of studs to various out-of-state destinations. It was conceded by the defendant, however, that no out-of-

state deliveries were made during 1959 or 1960. The testimony pertaining to the defendant's reason for discontinuing these deliveries was somewhat conflicting. Elwood Welch, the secretary of defendant corporation, testified that there had been no change of company policy commencing in the year 1959, and that the defendant was at all times willing to sell and deliver its studs to both in-state and out-of-state buyers. Plaintiff Mulder testified, however, that there had been a definite change in delivery procedures subsequent to 1958 and that the defendant henceforth arranged to have its out-of-state buyers come to the Ridgewood Ranch and pick up the studs ordered in their own trucks. He also testified that the defendant did not have either an Interstate Commerce Commission permit or Interstate Commerce Commission plates for its trucks.

In any event, all of the hauls made by defendant's drivers during the years 1959 and 1960 were between two points within the State of California. In the majority of cases, the drivers would pick up studs at the Ridgewood Ranch and deliver them to various tracts under construction and to retail or wholesale lumber dealers. Although the defendant introduced evidence to the effect that certain of these wholesale dealers ultimately shipped some of the defendant's studs to out-of-state retail buyers, there was no evidence that such shipments were part of any continuous out-of-state movement commencing at the Ridgewood Ranch. To the contrary, plaintiff Mulder testified that the bills of lading or waybills showed the ultimate

destination of the loads delivered by defendant's drivers to be the lumber yard of the particular California wholesaler. Mr. Welch himself confirmed this testimony, and stated that the defendant's duties with regard to its studs ceased upon delivery to an in-state wholesale customer, that the defendant did not undertake to tell its wholesale customers what to do with the studs, and that any further shipment of the studs was dictated by the wholesaler's own requirements and by orders which it might receive from its own out-of-state customers.

In addition to the intrastate shipments to tracts and to retail and wholesale lumber dealers, there was also evidence that the defendant's drivers were occasionally required to haul studs, by way of private road, from the defendant's stud mill to a railroad siding also located on the Ridgewood Ranch, where the studs were loaded on cars and shipped to various out-of-state destinations. The total distance from the mill to the siding was some 1½ to 2 miles.

There was also evidence that sometime during 1959, defendant's drivers delivered the component parts for a feed mill from the Miller Manufacturing Company in Modesto, California, to the Ridgewood Ranch, and that certain of these parts had been manufactured in other states. The feed mill machinery had been ordered by Welch & Welch, a partnership, whose principal place of business was also located at the Ridgewood Ranch and whose members were identical with the shareholders of defendant corporation. Mr. Welch testified that the two companies frequently exchanged

equipment and labor and that defendant corporation had provided the trucks and drivers to pick up and deliver the feed mill parts ordered by Welch & Welch. Mr. Thompson, the president and general manager of the Miller Manufacturing Company, testified that Welch & Welch had ordered the parts for the feed mill from his company, that certain of the parts had been manufactured by his company in Modesto and other parts had been ordered from out-of-state manufacturers. Mr. Thompson also testified that certain of the parts manufactured outside the state had been purchased by his company from dealers within the state, and that other parts which had been ordered directly from out-of-state sources were stored by his company for some five or six months before being sold to a particular in-state customer.

Upon this evidence, the trial court found that during the years 1959 and 1960, the defendant was subject to the provisions of the Fair Labor Standards Act and had employed plaintiffs as truck drivers; that at various times during these years, plaintiffs had worked in excess of 40 hours per week; that although plaintiffs were entitled to time-and-a-half for the hours so worked, defendant paid them only straight time; that plaintiff Mulder was entitled to unpaid wages in the amount of $2,220.90, plaintiff Woodall to unpaid wages in the amount of $2,240.03, and plaintiff Riddle to unpaid wages in the amount of $1,885.77; that defendant's refusal to pay the amounts due had necessitated the bringing of the instant action and that $500 was a reasonable amount to allow each plaintiff

for attorney's fees; that plaintiffs were also entitled to liquidated damages in the amount of their unpaid wages. The court also found that plaintiff Riddle had worked 216 hours for which he received no pay whatever, that his wages at that time were $2.37 per hour, and that he was entitled to recover the sum of $511.92. Judgment was accordingly entered and defendant appealed therefrom.[1]

Appellant first contends that its trucking operations were exempt from the wage and hour provisions of the Fair Labor Standards Act by virtue of section 13, subdivision (b)(1) of said act (29 U.S.C.A., § 213(b)(1)), which provides in relevant part that "The provisions of section 207 of this title shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 . . ."

Section 304, subdivision (a)(3) of Title 49 (49 U.S.C.A., § 304(a)(3)), provides that "It shall be the duty of the Commission . . . [t]o establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment." Pursuant to section 303, subdivision (a)(17) (49 U.S.C.A., § 303(a)(17)),

[1]Although the notice of appeal actually provided that "defendants Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr., hereby appeal . . . from said judgment," the latter two individuals appear to have abandoned their appeal and have filed no briefs with this court.

". . . [t]he term 'private carrier of property by motor vehicle' means any person . . . who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Pursuant to section 303, subdivision (a)(13) (49 U.S.C.A., § 303(a)(13)), ". . . [t]he term 'motor vehicle' means any vehicle . . . used upon the highways in the transportation of passengers or property . . ." Section 303, subdivision (a)(12) (49 U.S.C.A., § 303(a)(12)), provides that ". . . [t]he term 'highway' means the roads, highways, streets, and ways in any State."

The application of the exemption set forth in section 13, subdivision (b)(1) of the Fair Labor Standards Act is determined solely by the existence of power to regulate in the Interstate Commerce Commission and it is not necessary for the commission to have exercised this power and actually established qualifications and maximum hours of service. (Levinson v. Spector Motor Co. (1947) 330 U. S. 649, 661.)

Appellant asserts that it clearly qualified as a "private carrier of property by motor vehicle" subject to the commission's power to regulate because the interstate character of its operations was conclusively established by evidence that (1) appellant's trucks were driven to out-of-state destinations prior to 1959 and no change in company policy occurred in 1959; (2) appellant's trucks delivered studs to wholesale lumber dealers who subsequently "transhipped" these studs

to out-of-state destinations without reprocessing; (3) appellant's trucks carried machinery from the Miller Manufacturing Company in Modesto to the Ridgewood Ranch, and certain of this machinery was ordered from out-of-state manufacturers; and (4) appellant's trucks carried studs to railroad sidings, where such studs were loaded and shipped to out-of-state destinations.

Taking these contentions in order, it is apparent that the testimony pertaining to the presence or absence of a change in company policy regarding out-of-state deliveries presented a question of fact for the trial court. Although appellant's secretary testified that no such change occurred, there was evidence that appellant had arranged to have its out-of-state buyers pick up their studs at appellant's mill at all times subsequent to 1958 and that appellant made no single out-of-state delivery during 1959 and 1960. Under such circumstances, it clearly cannot be said that the evidence was insufficient as a matter of law to support a finding that here had been a change in company policy and that appellant had deliberately discontinued its out-of-state deliveries after 1958.

The evidence that appellant delivered its products to California wholesalers, some of whom ultimately reshipped the products out of state, similarly does not suffice to render appellant a private carrier subject to the regulatory powers of the Interstate Commerce Commission. Since the evidence clearly indicated that appellant had no further interest in its studs following sale and delivery to California wholesalers, it is appar-

ent that appellant did not participate in any continuous movement of products into interstate commerce. In Dallum v. Farmers Co-Operative Trucking Ass'n. (D. Minn. 1942) 46 F. Supp. 785, the court held that butter which was delivered to a distributing center and stored until such time as it could be transported to customers was not in interstate commerce until such time as it left the distributing center enroute to out-of-state customers. Although the butter was transported to the distributing center with knowledge that it might eventually be shipped out of state, no further movement of the butter to any particular person was contemplated and delivery was dependent upon the demands of customers. The court stated, "Mere intention by the owner to place goods in interstate commerce, or the gathering of goods at a depot for that purpose, is not sufficient. It must appear that the goods have entered upon transportation to another state before it can be said that they are in interstate commerce." (Pp. 787-788.)

In the present case, the record is devoid of any evidence that appellant's studs were already destined for a particular out-of-state customer at the time they left the Ridgewood Ranch. The evidence establishes, to the contrary, that appellant sold its studs only to California wholesalers and that it had no foreknowledge of the fact that certain of its studs might ultimately be shipped out of state.

Appellant's delivery of feed mill parts to the Ridgewood Ranch presents the converse situation. The evidence reveals that the machinery in question was

ordered by Welch & Welch from the Miller Manufacturing Company in Modesto, California. Although it is true that certain of these parts were ordered by the Miller Manufacturing Company from out-of-state sources, there is no indication in the record that either Welch & Welch or appellant and its drivers were aware of this fact. In addition, there was evidence to the effect that certain of the parts which had been manufactured out of state were either obtained from California suppliers or were retained in the warehouse of the Miller Manufacturing Company for several months prior to their delivery to the Ridgewood Ranch. Under such circumstances, we believe the trial court would be justified in concluding that the parts in question were no longer in interstate transit when they were picked up by appellant's trucks. Moreover, in our opinion an isolated incident of this nature is not sufficient to render appellant and its employees subject to the regulatory powers of the Interstate Commerce Commission.

The deliveries to the local railroad siding on the Ridgewood Ranch appear to fall directly within the holding of Henry W. Robertson Contract Carrier Application (1942) 34 I.C.C. Reports, Motor Carrier Cases, No. M.C. 96212. In that case, the applicant sought a permit authorizing his operation in interstate or foreign commerce as a contract carrier by motor vehicle. The evidence revealed that the applicant transported zinc and lead concentrates from the mine bins to cars at railroad sidings, where they were loaded and shipped to out-of-state points. The ship-

ments from the mines to the sidings covered distances of not more than two miles and were entirely intrastate and over private rights of way. These shipments were made, however, with the intent to transport the concentrates in a continuous movement to out-of-state destinations. The commission nevertheless held that the applicant was not subject to its regulatory powers. In so holding, the commission pointed out that Part II of the Interstate Commerce Act, from which it derived its powers, defined "motor vehicle" as "any vehicle . . . used upon the highways . . ." (see 49 U.S.C.A., § 303(a)(13)) and further defined "highway" as "the roads, highways, streets, and ways in any State" (see 49 U.S.C.A., § 303(a)(12)). Since the applicant shipped his goods only over private rights of way, he did not qualify as a contract carrier "by motor vehicle" within the meaning of the act.

In the instant case, appellant's drivers similarly made practically all of their trips to the railroad siding entirely over a private road on the Ridgewood Ranch, the only exception occurring when the load was of such an unusual size that it would not go through the underpass beneath Highway 101, at which time, for a short distance, the trucks would traverse said highway. It is also to be noted that said highway traversed the Ridgewood Ranch, the owner of the fee to the area over which the state enjoyed an easement for the purpose of the highway use.

Appellant strenuously argues that the trial court's method of computation fails to comply with the Fair Labor Standards Act and demands a reversal of the

judgment on this ground alone. We have read the testimony and examined the exhibits offered on behalf of plaintiffs, and we find no support for such contention. The appellant ignores the fact that we are faced here not with persons working a set five-day week with an eight hours per day schedule of employment, but rather truck drivers who worked a seven-day week with only an occasional day off each month, if fortunate, and whose pay was based on an hourly rate requiring the truck to be moving, refueling, loading or unloading, the hours of pay necessarily varying with the distance from the plant to the place of delivery. The trial court's adoption of plaintiffs' allowance of 80 or 88 hours for each pay period was more than fair to appellant, for we can readily see how by reason of breakdown of the equipment or other delays a driver could, during a seven-day week, only be entitled to straight time well below 40 hours and yet in the following week be so continuously occupied that his compensable time would run many hours beyond the straight time period of 40 hours, yet under the computation here used would sacrifice overtime hours to make up the deficit below the 40 hours in the previous week before setting the number of his compensable overtime hours. Such advantage enjoyed by the appellant furnishes no valid ground for complaint. If appellant wished a more detailed method of computation, it had its opportunity to develop the same, for it was from its records that the figures arrived at by the trial court were deduced.

Appellant next contends that the court erred in awarding respondents penalties in an amount equal to

the unpaid overtime wages found to be due them. Appellant asserts that the record contains uncontroverted evidence that its failure to pay its employees time-and-a-half for overtime was due to its good faith belief that it was not subject to the wage and maximum hour provisions of the Fair Labor Standards Act. Under such circumstances, appellant contends that the award of penalties must be reversed.

Pursuant to section 207, subdivision (a)(1) of the Fair Labor Standards Act (29 U.S.C.A., § 207(a)(1)), "no employer shall employ any of his employees . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . ."

Section 216, subdivision (b) (29 U.S.C.A., § 216(b)) provides that "Any employer who violates the provisions of . . . section 207 . . . shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."

Section 260 of the Portal-To-Portal Act (29 U.S.C.A., § 260), upon which appellant relies, provides that "In any action commenced prior to or on or after May 14, 1947 to recover . . . unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation

of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."

In order to escape payment of liquidated damages, pursuant to the section above quoted, the employer must sustain the plain and substantial burden of persuading the court by proof that his failure to obey the Fair Labor Standards Act was both in good faith and predicated upon such reasonable ground that it would be unfair to impose upon him more than a compensatory judgment. (Wright v. Carrigg (C.A.S.C. 1960) 275 F. 2d 448.)

In the present case, appellant has failed to direct this court's attention to any testimony demonstrating that appellant had reasonable grounds for believing that it was not required to pay its employees the overtime compensation required under the Fair Labor Standards Act. Although appellant now asserts that it was under the belief that its interstate activities rendered it subject to Part II of the Interstate Commerce Act and thereby exempted it from the wage and maximum hour provisions of the Fair Labor Standards Act, this contention is not borne out by the record, which reveals that appellant made no interstate truck shipments during the years 1959 and 1960, and that appellant never applied for or received an Interstate Commerce Commission permit or plates. The only testimony bearing directly upon appellant's good faith belief that it was exempt from the wage and maximum hour provisions of the Fair Labor Stand-

ards Act consisted of Mr. Welch's statement that he had always considered lumber "an interstate article" regardless of where it was shipped or what was done with it. Under such circumstances, it cannot be said that the court abused its discretion in awarding respondents liquidated damages.

Appellant's next contention is that there is no support in the evidence for respondent Riddle's award of $511.92 as compensation for the hours spent with his truck during breakdowns. We agree. An examination of the findings fails to reveal the precise basis for this award, since the findings, as above noted, merely state that respondent Riddle had worked a specified number of hours and was entitled to recover wages therefor. The trial court's memorandum opinion, however, indicates that this award was predicated upon an implied contract theory whereby appellant employer impliedly agreed to pay his employees for all time spent on its behalf. Since the Fair Labor Standards Act contains no provisions specifically requiring the payment of "breakdown time," it would appear that this implied contract theory constitutes the only basis, if any, upon which the award could be upheld.

However, a thorough review of the record fails to disclose any evidence of such an implied contract. Respondent Riddle testified that he had never discussed payment for breakdown time with appellant, and that he had always been paid only for actual driving time, for fuel time, and for loading and unloading. He also stated that the trucks were equipped with clocks which recorded the hours during which the truck was in motion and which stopped when the truck

was at rest. He stated that he was always paid for the time recorded on the disc and for any additional time spent in fueling, loading and unloading; that he never asked appellant to pay him for his breakdown time; and that he continued to work for appellant knowing that he would receive no compensation for this time.

In view of this evidence, there is no justification for the award of breakdown time to respondent Riddle. Civil Code, section 1620, states that "An express contract is one, the terms of which are stated in words." Civil Code, section 1621, provides that "An implied contract is one, the existence and terms of which are manifested by conduct." It is settled that both types of contract are identical in that they require a meeting of the minds or an agreement. (Desny v. Wilder (1956) 46 Cal. 2d 715, 735.) The true implied contract consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. (Silva v. Providence Hospital of Oakland (1939) 14 Cal. 2d 762, 773.)

In the instant case, there is a complete absence of any evidence indicating that appellant and respondent Riddle ever arrived at an agreement that appellant would pay respondent Riddle for his breakdown time. To the contrary, the evidence is strongly indicative of an implied agreement that no such compensation would be paid. Under such circumstances, the award of $511.92 to respondent Riddle may not be upheld.

Appellant next contends that the trial court failed to make findings of fact on all material issues raised.

by the pleadings and evidence. Appellant asserts, more specifically, that the trial court failed to make any finding that appellant was not exempt from the overtime provisions of the Fair Labor Standards Act; that the court failed to find the number of hours worked by each respondent in excess of 40 hours per week; and that the court failed to find whether appellant acted in good faith in failing to pay respondents time-and-a-half for the overtime hours worked.

The findings that appellant was subject to the Fair Labor Standards Act during the years 1959 and 1960 and that respondents were entitled to recover time-and-a-half pay and liquidated damages for the overtime hours worked negate by necessary inference appellant's claim that it was exempt from the wage and hour provisions of the Fair Labor Standards Act. (Kux v. Cal-West Lumber Corp. (1958) 162 Cal. App. 2d 500, 505; Petersen v. Murphy (1943) 59 Cal. App. 2d 528, 534.) Since the court found the total amount of overtime pay due each respondent and since such findings are statements of ultimate fact (Nisbet v. Rhinehart (1935) 2 Cal. 2d 477, 482), the court was not required to make additional findings relative to evidentiary matters such as the number of overtime hours worked by each respondent. (People v. Hecker (1960) 179 Cal. App. 2d 823, 832; Gross v. Needham (1960) 184 Cal. App. 2d 446, 463.) A finding that appellant did not act in good faith when it failed to pay respondents the required overtime compensation would appear unnecessary in view of the finding that respondents were entitled to liquidated damages. (Kux v. Cal-West Lumber Corp., supra; Petersen v.

Murphy, supra. In any event, appellant did not plead the defense of good faith and offered no evidence pertaining thereto.

Appellant's final contention is that the findings of fact, conclusions of law and judgment are unsupported by the evidence in two respects: (1) that respondents failed to prove the amount of overtime pay to which they were entitled, and (2) that the judgment was made to run against E. C. Welch and J. D. Welch, Jr., as well as against appellant. The first of these arguments is without merit, since as above noted, respondents supported their wage claims by time cards covering their total periods of employment during 1959 and 1960 and by itemized computations based upon those time cards.

Appellant's second contention raises a more serious problem. An examination of the pleadings and pretrial conference order fails to disclose that the action was brought against any other defendant than appellant Mendo Wood Products, Inc. At the commencement of the trial, however, respondents' attorney suggested a stipulation to the effect that appellant Mendo Wood Products, Inc. was in the process of dissolution and that Jeff Welch and Elwood Welch had agreed that any judgment which might be entered in the action would be binding on them. Counsel for appellant stated that he had given counsel for respondents a written guarantee but that he had no authority to file it in the action. At a subsequent stage in the proceedings, the subject was again broached, and appellant's counsel reiterated that there was a guarantee, that

respondents' counsel had a copy, that it covered any judgment that might be rendered in the within action, but went no further.

On December 21, 1962, judgment in favor of respondents was entered against appellant Mendo Wood Products, Inc. Notice of appeal from this judgment was filed on behalf of Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr. The latter two individuals, as above noted, took no further steps to perfect their appeal. On March 15, 1963, the court entered a new judgment in order to eliminate an award of interest which had inadvertently been inserted in the original judgment. The amended judgment ran against defendants "Mendo Wood Products, Inc., E. C. Welch, and J. D. Welch, Jr." Although this judgment is not a part of the record in the instant appeal, it is this judgment which appellant Mendo Wood Products, Inc. now attacks on the ground that it was erroneously made to run against the Welches. It is settled that an appellant may not on his appeal urge errors which affect only his coparties who do not appeal, and that such errors can be reviewed only at the instance of the parties affected thereby. (Estate of Nepogodin (1955) 134 Cal. App. 2d 161, 173; Broadway Fed. etc. Loan Assoc. v. Howard (1955) 133 Cal. App. 2d 382, 400.) Since the Welches chose to abandon their appeal, their rights cannot be asserted by appellant Mendo Wood Products, Inc. as a ground for reversal.

Respondents' motion to dismiss this appeal, on the ground that it was taken from a judgment which is

nonappealable by virtue of having been superseded by a new and different judgment, is denied.

In the present case, it is clear to us that the trial judge never intended the judgment to include an award of interest. It was by inadvertence that the judge signed this judgment, prepared by respondents' counsel, which awarded interest. Upon being brought to the court's attention, respondents immediately conceded the error and the matter was corrected.

It is settled that where the amendment merely corrects a clerical error and does not involve the exercise of judicial discretion, the original judgment remains effective and unimpaired and the amendment does not operate as a new judgment from which a new appeal may be taken. (O'Connor v. Skelton (1961) 195 Cal. App. 2d 612, 614-615; McConville v. Superior Court (1926) 78 Cal. App. 203, 207; George v. Bekins Van & Storage Co. (1948) 83 Cal. App. 2d 478, 480-481.)

For the reasons above stated, the judgment is modified by reducing the amount of damages awarded respondent Riddle from $4,783.46 to $4,271.54, and as so modified, the judgment is affirmed.

Shoemaker, P. J.

We concur:

Agee, J.

Taylor, J.

Filed March 17, 1964.

Lawrence R. Elkington, Clerk.

In the District Court of Appeal
State of California
First Appellate District

DIVISION TWO

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1 Civil No. 21,307

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,
vs.
Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

BY THE COURT

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated, April 16, 1964

Shoemaker, P. J.

Filed April 16, 1964.
Lawrence R. Elkington, Clerk.

Order due
May 15, 1964

In the Supreme Court of the State of California

In Bank

Albert Mulder, Robert B. Riddle, and Arthur O. Woodall,
Plaintiffs and Respondents,
vs.
Mendo Wood Products, Inc., E. C. Welch and J. D. Welch, Jr.,
Defendants and Appellants.

ORDER DENYING HEARING
AFTER JUDGMENT
BY DISTRICT COURT OF APPEAL
1st District, Division 2, Civil No. 21,307

Appellant's petition for hearing DENIED.

Schauer, J., is of the opinion that the petition should be granted.

Gibson, Chief Justice

Filed May 13, 1964.
Lawrence R. Elkington, Clerk.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby cer-

tify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 13 day of May, A.D. 1964.

William I. Sullivan, Clerk,
By G. E. Bishel,
Deputy Clerk.

Filed May 13, 1964,
William I. Sullivan, Clerk.

Appendix B

Each of the following federal statutes have been referred to in the foregoing petition. Each is extensive, but only small portions are relevant to the matters presented in the petition. This Appendix B contains such relevant provisions in exact quotation form.

CONSTITUTION OF THE UNITED STATES

(As printed in United States Code, Annotated)

Section 8. Clause 3. *Regulation of Commerce*.

The Congress shall have Power * * * To regulate Commerce * * * among the several states, * * *

Amendment XIV, Citizenship; Privileges and Immunities; Due Process; Equal Protection; * * * Enforcement. (As printed in United States Code, annotated.)

> Section 1: * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 28, U.S.C., *Judiciary and Judicial Procedure*. Section 1257, in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

permit averaging of hours over two or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the ten (10) overtime hours worked in the second week, even though the average number of hours worked in the two weeks is 40.[1]

Sec. 785.0(a) The Fair Labor Standards Act * * * also provides that no such employee may be employed for more than 40 hours a week without receiving at least time and one-half of his regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours he has worked."[2]

[1]Also contained in Title 29, Labor, Code of Federal Regulations, Section 778.2 (c) and (d).

[2]Also contained in Title 29 Code of Federal Regulations, Section 785.0, until that section was renumbered as 785.1 by 26 Federal Regulations 7732, August 18, 1961, and the language slightly changed, but not in such manner as to affect this litigation.

Table of Authorities Cited

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Statutes

Fair Labor Standards Act of 1938 (29 USCA 201-219) 2

Motor Carrier Act of 1935 (49 USCA Part II) 2

28 USCA 1257, page 147 et seq., note 69 et seq. 3

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Texts

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No.

MENDO WOOD PRODUCTS, INC.,
Petitioner,
vs.
ALBERT MULDER, ROBERT B. RIDDLE, and ARTHUR O. WOODALL,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California First Appellate District, Division Two

The facts and applicable law in this case are uncomplicated and can be simply stated. It is now nearly two years since the trial court's decision, and justice should not be further delayed. There is no federal

question of substance and the rules and decisions of the Supreme Court clearly indicate that cases of this nature are not of interest.

This action was commenced by three laborers, truck drivers, to recover time and one-half as provided by the Fair Labor Standards Act of 1938 (29 USCA 201-219) instead of mere straight time. The defense has now filtered down to a claim of exemption to the Act last cited because of a provision in the Motor Carrier Act of 1935 (49 USCA Part II). The State concluded that the facts failed to show interstate commerce to the extent required to bring a case within the purview of the Motor Carrier Act; hence the Act did not apply, and the exemption therein did not apply. Therefore, judgment had to be for the truck drivers.

Petitioner propounds three questions for the Supreme Court (Petitioner's brief, pages 4-5) but then readily admits "they really fall into a single category" (page 18) and "the single question propounded . . ." (page 19) "is the interpretation by the California courts of its own law . . . Or, as we here assert, disregard or disobey or fail to observe the laws of the State of California . . ." (page 24)

What petitioner keeps repeating on the pages last referenced is a charge that the state courts failed to properly weigh or apply the evidence, and particularly that the findings were not as detailed as petitioner believes was required under state law.

Petitioner makes no reference to and cites no authorities or any question of federal law, and nowhere

contends that any error of law was committed; all petitioner says is that a different view of the evidence, or a more complete set of findings, might justify a different judgment.

Supreme Court Rule 38-5(a) (28 USC 67) provides that a Writ of Certiorari may issue only

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Petitioner makes no attempt to bring itself within this rule.

28 USCA 1257 (upon which petitioner relies), page 147 et seq., note 69 et seq., refers to numerous authorities holding that the Supreme Court is not interested in local procedure or state practice. The rule is set out in 36 C.J.S. 740 thusly:

> ". . . the United States Supreme Court may not review the decisions of state courts as to questions of state practice or procedure or the sufficiency, construction, etc., of pleadings, and this is the rule even though the action is brought under a federal statute."

Thus we conclude that the Supreme Court is not going to inject itself into the question of what view the state courts should have taken of the evidence, the extent of the findings required by the laws of California, nor the interpretation of state laws by the state courts.

Each contention made by petitioner was discussed by the court to which petitioner would have the writ issue. The principal, if not sole, contention relative to inadequacy of the findings was covered by this language:

> "The first of these arguments is without merit, since, as above noted, respondents supported their wage claims by time cards covering their total periods of employment during 1959 and 1960 and by itemized computations based upon those time cards."

That the findings were sufficient can hardly be more eloquently or conclusively stated than to point to the denial of a hearing by the State Supreme Court.

Dated, Ukiah, California,
September 1, 1964.

Respectfully submitted,
DAVID L. LUCE,
Attorney for Respondents.

THOMAS L. CLELAND,
Of Counsel.